IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

KRISTIE L. ANGSTADT, a minor, By Her Next Friend, LISA D. TODD, Plaintiffs, v. NORMAN M. LIPPMAN, D.D.S., Defendant.	))))))))))	C.A. NO. 04C-02-041 (RBY)

O R D E R

In this case, Dr. Timothy Gilbert, an anesthesiologist, was called by Plaintiff to testify as an expert witness relative to the standard of care required of a physician administering anesthetics.

Prior to the commencement of trial, counsel for Defendant moved to have Dr. Gilbert excluded as an expert witness, because of responses he gave during a discovery deposition. Those responses are:

> Q: Do you know what oral surgeons do in terms of advising patients of the risk when they are doing a procedure for a sterile abscess?
> A: No.
> Q: Do you hold yourself out as an expert on the standard of care of oral surgery? (Emphasis added).
> A. I would let an oral surgeon speak to that.
> Q. I take it then the reason why you don't hold yourself out as an expert in the area of standard of care of oral surgery is because you are on anesthesiologist, correct?
> A. Yes.

Q. And I take it you are not familiar with the day-to-day functioning of the oral surgeon's practice outside of the hospital setting? Is that fair?
A. That's fair.
Q. That's why you would not be able to address the standard of care issue with regards to the oral surgeon?
A. No. I've not been asked to do so.

At the same time, as of both the discovery and trial depositions, Dr. Gilbert had provided, and defense counsel was possessed of, a thorough report detailing that which Dr. Gilbert had been asked to do, and had opined.

The Court, in response to that Motion in Limine filed by Defendant, held that Dr. Gilbert, by his aforecited responses could not address medical standard issues of informed consent or oral surgery procedures. His testimony, in toto, would not be precluded, however, since – as was asserted by Plaintiff – his testimony dealt with the choice and administration of anesthesia for a stated procedure. For those items, Defendant Lippman wore two hats: an oral surgeon's and an anesthesiologist's. Relative to the former, Dr. Gilbert could not testify. Relative to the latter, Dr. Gilbert properly did.

There is an area which does not have such bright lines of demarcation, though. That is the area of informed consent. Dr. Gilbert ventured into that area to some degree. During his video testimony, the following occurred (transcribed on p. 30 of the deposition):

Q: (by counsel for Plaintiff) Doctor, given the difference...does it appear from the records, that either her [sic] or her mother consented to the anesthesia that she actually received on March 7th of 2002?

> A: Well, the only thing I have is..."mother is okay with this". So owing to the sparseness of this, I don't think there's any other consent to a general anesthetic that was given to her.

That, although not specifically raised by counsel prior to the videotape presentation, was duly objected to at the taking of the deposition. The answer, while imprecise as to its having rendered an actual opinion in direct response to the question, certainly addresses the area of informed consent. Dr. Gilbert, having stated at his discovery deposition, without equivocation, that he did not know the standards for oral surgeons regarding advice of risk, effectively removed himself from the rendering of any opinions on this subject. Accordingly, the above stated colloquy is impermissible.

We now turn to Defendant's request, Dr. Gilbert's having testified, to read into evidence the portion of Dr. Gilbert's discovery deposition, taken approximately a year prior to trial, which was quoted at the outset of this discussion.

Plaintiff has objected on the basis that this is deposition material, which fails to satisfy any criterion for admission. Several rules, from different sources may be implicated, but primarily Civil Rule 32 creates the standard. Hence: "At trial...any part of a deposition, so far as admissible under the rules of evidence...may be used...in accordance with any of the following provisions:

> (1) [contradicting or impeaching]
>
> (3) ...if...(B)...the witness is out of the State of Delaware...or (E)...exceptional circumstances exist as to make it desirable, in the interest of justice...to allow the deposition to be used...

The Court finds that this deposition section does not satisfy any Rule 32

criterion. Since it is offered as a statement by someone, who(once the trial deposition concluded) was no longer present, DURE 804 may be addressed in order to see if this would be an exception to hearsay. Clearly, it does not satisfy subparts 2 though 6. Superficially, it could be viewed as "(1) Former testimony." Many safeguards (oath taking, opposing counsel presence, opportunity for cross-examination, etc.) exist. One, however, is decidedly, critically and determinatively absent. In this discovery deposition of Plaintiff's expert, counsel had utterly no "similar motive" to develop testimony by cross-examination. As Judge Herlihy stated in Hambleton v. Christiana Care Health Services, Inc., 2002 WL 183851:

> This was a discovery deposition. If defendants wanted to rehabilitate his competency credentials, they were not necessarily compelled to do so in this context. Nor were they necessarily compelled to ask any questions. Obviously, they had the opportunity to do so and there is a risk by not doing so in some circumstances. The Court does not believe that opposing counsel must always realize or appreciate there is a substantial risk that every discovery deposition could be used at trial. If so, this would result in prolonging making more expensive and more treacherous discovery depositions.

To that same effect, it should be observed that a lawyer whose client or expert is being deposed for discovery purposes by the opposition has every motive not to ask a single question, unless drastic rehabilitation is required. Once the opponent completes his questioning, the last thing that good representation calls for is the creation of something which may suggest new ideas to the original deposition taker and time to think about them.

Returning to Rule 32, counsel for Defendant suggests that (3)(E) exceptional circumstances exist, because trial counsel, who had tried to have the trial deposition

re-scheduled, could not attend the Gilbert trial deposition in Maryland, because of his involvement in a different trial in Delaware on the same day. The Gilbert trial deposition was, however, covered by an associate of Defendant's trial counsel (himself a trial attorney). Accordingly, Defendant's trial counsel asserts, due to reliance upon the aforecited deposition transcript, the covering lawyer properly anticipated that Dr. Gilbert would be precluded from testifying. As demonstrated by the outcome of Defendant's Motion in Limine, and for the reasons there stated, that was not a solid assumption. More importantly, thorough cross-examination was conducted; the report of Dr. Gilbert was available; the transcript of the discovery deposition was available; and appropriate objections were registered by covering defense counsel. Other than reiterating those very same discovery deposition questions verbatim, the areas in question were treated with cross-examination and objections.

The Court, therefore, finds no "exceptional circumstances" demanding the use of the discovery deposition in this proceeding to satisfy the interests of justice. Indeed, since use of that discovery would preclude Plaintiff's counsel from asking the follow-up question: "But that has nothing to do with your opinion regarding use of anesthesia, does it?" That would be the injustice.

Accordingly, Defendant will not be permitted to utilize as evidence (either by exhibit or by "read-in") the requested portions of Dr. Gilbert's discovery deposition.

SO ORDERED this 16th day of February, 2006.

/s/ Robert B. Young
J.

oc: Prothonotary
cc: Counsel
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